14210

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 88.

THE CLEVELAND TRUST COMPANY, PLAINTIFF IN ERROR,

vs.

M. A. LANDER, TREASURER OF CUYAHOGA COUNTY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action was originally brought in the common pleas court of Cuyahoga county, Ohio, by The Cleveland Trust Company, a corporation organized under the laws of the State of Ohio, plaintiff in error, against M. A. Lander, treasurer of Cuyahoga county, Ohio, defendant in error, for the purpose of restraining and enjoining the said treasurer from collecting or attempting to collect from the plaintiff in error or from its individual stockholders certain taxes as the same stand charged on the duplicate of Cuyahoga county, Ohio (Record, pp. 2–5).

This plaintiff made the ordinary and legal return of its

resources and liabilities, together with the other facts required by the statutes of Ohio, to the auditor of Cuyahoga county on the Wednesday next preceding the second Monday in May, 1898, and deducted from its assets its holdings in United States Government bonds, valued at $213,274.84 (Record, pp. 2, 3).

Thereafter the auditor of Cuyahoga county refused to allow the said deduction of said Government bonds as made and claimed by this plaintiff in error and entered the valuation of the property of this plaintiff in error, including said Government bonds, upon the tax duplicate of said county and assessed taxes against the same at the rate of .02955 cents on each dollar's valuation (Record, p. 3).

Thereafter said auditor delivered to the county treasurer a true copy of the duplicates containing the tax-list required by him to be made, and the taxes which this plaintiff in error claims were so unlawfully assessed by reason of the acts of the auditor of Cuyahoga county in including the value of said United States Government bonds amount to $4,283.71 (Record, pp. 3, 4).

Thereafter the plaintiff in error duly tendered to the defendant in error the amount of taxes due, excluding the amount so assessed on said Government bonds, and the taxes which this plaintiff in error seeks to restrain and enjoin the said defendant from collecting or attempting to collect are the taxes so unlawfully assessed upon said United States Government bonds (Record, p. 4).

Thereupon this plaintiff in error filed its petition to restrain and enjoin the defendant in error from collecting or attempting to collect taxes so unlawfully assessed upon said United States Government bonds. A restraining order was allowed, as prayed for in the petition (Record, pp. 2, 3, 4, 5, 7).

Thereafter a demurrer to the original petition was filed by the defendant in error setting forth the following grounds:

"For the reason that the same does not set forth "facts sufficient to constitute a cause of action" (Record, p. 6).

Said demurrer was sustained by the court of common pleas and judgment rendered in favor of the defendant in error against the plaintiff in error (Record, p. 8).

Thereupon error was prosecuted to the circuit court of Cuyahoga county, Ohio, which court affirmed said judgment (Record, pp. 6, 7, 8).

Thereupon error was prosecuted to the supreme court of the State of Ohio, which court affirmed said judgment (Record, pp. 10, 11).

Thereupon, and to review the said judgment, this writ of error has been brought (Record, pp. 23–29).

ASSIGNMENT OF ERROR.

First. "The court erred in affirming the judgment "of the circuit court in sustaining the judgment of "the court of common pleas on the demurrer of the "defendant to the petition of the plaintiff."

Second. "The court erred in holding and deciding "that The Cleveland Trust Company was not enti- "tled, in making its statement to the auditor of "Cuyahoga county, Ohio, under sec. 2765 of the Re- "vised Statutes of Ohio, to deduct, for the purpose of "taxation, from its capital and surplus, the amount "of the United States Government bonds owned by it "under and by virtue of section 3701 of the Revised "Statutes of the United States as claimed in the "original petition of the plaintiff."

ARGUMENT.

The plaintiff in error maintains:

That under the constitution and laws of the State of Ohio, the property of a trust company organized under the laws of Ohio and conducting its business therein must be and is subject to taxation.

That the sections of the statutes of the State of Ohio which provide the method for determining this tax value, so far as they apply to such trust company, simply prescribe a convenient method for arriving at the true value in money of the property of the corporation.

That, in determining the value of such property for taxation, the trust company is entitled to deduct from its capital and surplus the value of the United States Government bonds then owned by it.

That the laws governing the taxation of the shares of national banking associations and the interpretation of such laws do not control the question at issue in this case.

POINT 1.

The constitution of the State of Ohio specifically requires that the property of corporations, and especially of banking institutions, shall be taxed.

Section 4 of article 13 of the constitution provides that—

> "The *property of corporations* now existing or here-
> "after created shall forever be subject to taxation
> "the same as the *property* of individuals."

And section 3 of article 12, which has to do with the taxation of banks, provides:

> "The General Assembly shall provide by law for
> "taxing the notes and bills discounted or purchased,

"moneys loaned, and *all other property*, effects or dues,
"of every description (without deduction) of all banks,
"now existing, or hereafter created, and of all bank-
"ers, so that *all property employed in banking*, shall
"always bear a burden of taxation, equal to that im-
"posed on the *property of individuals*."

The old constitution of the State of Ohio had no such limiting clause or clauses regarding taxation. The result was great confusion in the tax laws. The burden of taxation was very unequally imposed. As shown by the debates of the convention of 1851, this very question was discussed more than any other before that body, and the purposes of the present constitutional provisions were clearly set forth, namely, to get all *property* in the State of Ohio on the tax duplicate and to value and tax *all property* at a uniform rate.

The construction of these sections was early passed upon by the supreme court of Ohio.

Exchange Bank *vs.* Hines, 3 O. S., 1.

Pages 6, 7:

"The question, whether the tax law of April, 1852,
"imposes a burden of taxation on property employed
"in banking, greater than that which is authorized
"by the constitution of the State, is one of grave im-
"port, requiring a careful and full examination.
"And the difficulties and embarrassments, to which
"it has given rise, and is still causing in the collec-
"tion of the public revenue, and enforcing the laws
"of the State, indicate the propriety of a very full ex-
"pression of opinion by the court.

"The third section of the twelfth article of the con-
"stitution, which confers the authority for taxing
"property employed in banking, is as follows:"
[Quoting the words of the section.]

> "This provision imperatively requires that all *prop-*
> "*erty*, effects, and dues of every description belonging
> "to banks should be taxed. The great variety of
> "form and condition in which property is employed
> "in banking, as well as its complex convolutions and
> "varying character, is somewhat peculiar. But those
> "things employed in this business, which constitute
> "proper subjects of taxation, in whatever form or
> "character they may be found, must possess the es-
> "sential elements and incidents of private property,
> "and are therefore capable of being clearly and cer-
> "tainly ascertained and identified."

The court there recognizes the contention of the plaintiff in error that it is simply the *property* of the bank which is sought to be taxed or can be taxed under the constitution.

While it is admitted that generally constitutional provisions will not enforce themselves, and that it is necessary for the legislature to enact laws relative thereto, there are, however, constitutional requirements which are mandatory and may in fact be self-executing.

Cooley on Taxation, 2d edition, page 326:

> "It is sometimes a serious question whether a con-
> "stitutional provision is so far complete and specific
> "in itself as to constitute a sufficient law without
> "assistance from legislation. If it is, it must be con-
> "sidered mandatory and self-executing, and effect
> "must be given to it accordingly."

What could be a more specific mandate than section 4, article 13:

> "The *property of corporations* now existing or here-
> "after created shall forever be subject to taxation
> "the same as the *property of individuals*."

Even if no special law existed providing for the manner of valuing bank property, none of that property could escape taxation, but it would all be placed on the tax duplicates under the general laws for listing and returning property.

Hence it follows that if the legislature does enact laws on a subject covered by a constitutional mandate, such laws must be construed as obeying that mandate or else be declared void, and in construing such laws the rule by which the courts are governed is clear.

State *vs.* Judges, 21 O. S., 11:

The operation and not the mere form of a statute determines its constitutionality.

State *vs.* Hipp, 38 O. S., 199:

Page 219:

> "To hold a legislative enactment to be void, where "it is not plainly in conflict with the organic law, is "as clearly unwarranted as to circumvent or nullify "a plain constitutional inhibition by holding that the "identical thing inhibited may be done under another "name."

Page 228:

> "The constitutionality of a statute depends upon "its operation and effect, and not upon the form it "may be made to assume."

The supreme court of Ohio, in the case at bar, admits that the constitution of Ohio requires the taxation of the property of banks:

> "It will be noticed that the property of corpora- "tions shall be subject to taxation the same as the "property of individuals. This implies that corpo- "rations shall be taxed either by the same methods "as individuals, or by separate statutes producing the

"same result as in the opinion of the General Assem-
"bly shall be best. It will be further noticed that
"banks and bankers shall be taxed on all their prop-
"erty without deduction by such laws as will compel
"them to bear a burden equal to that imposed upon
"the property of individuals" (Record, p. 19).

"Section 2, article XII (of the constitution), seems
"to make provision for the passage of laws for the
"taxation of the property of individuals only, but it
"is broad enough in its terms to include the property
"of banks and bankers and of all other corporations"
(Record, pp. 19, 20).

And referring to section IV of the constitution, which provides that the property of corporations shall be subject to taxation the same as individuals, the court holds:

"That object and scope is to enable the General
"Assembly to pass laws peculiarly suited and fitted
"for the listing and taxation of the property of corpo-
"rations so as to secure taxation on their property the
"same as on the property of individuals. It was then
"as now well known that in the extensive, scattered
"and diversified business and interests of corporations,
"it is often difficult to bring upon the tax duplicate,
"the full valuation of their property and that to secure
"that end it might be necessary to pass laws applica-
"ble to corporations and not applicable to individuals.
"The same is true as to banks and bankers, but both
"as to corporations and as to banks and bankers the
"taxation is restricted so as to be the same as that
"of individuals and to thereby prevent oppression"
(Record, p. 20).

Referring further to section 4, article XIII, of the constitution, the court holds:

"That section was inserted into the constitution for
"the purpose of clearly authorizing the General As-

"sembly to pass laws for the taxation of the property "of individuals and different laws for the listing and "valuation of the property of corporations; provided, "however, that the result should be that the taxation "of the property of both should be the same; that is, "that the burden of taxation should rest equally upon "all property in the State, whether held by individ-"uals or corporations, and leaving the General As-"sembly free to select the methods which, in its opin-"ion, would best reach that result" (Record, p. 21).

These quotations from the opinion of the supreme court of Ohio clearly show that that court recognizes that under the constitution of Ohio it is the property of banks that must be and is taxed; that the method of determining this value is one of convenience, but that the ultimate result is the value of the property of the bank.

However, in order to sustain the tax the supreme court of Ohio adopts the view that a tax upon the shares of a State bank is practically equivalent to a tax upon its property, and hence complies with the constitutional requirements. The court holds that taxation of both the property of the bank and the shares of stock in the hands of the holders would be double taxation and prohibited by the constitution of Ohio, and, further, that the limitations placed by the constitution are as to results, not methods (Record, p. 21).

In commenting upon that constitutional restriction the court held:

"The limitations and restrictions in question are as "to the result, and not as to the method of taxation. "The result must be the same, equality of taxation, but "the methods by which such result shall be attained "are left to the discretion and sound judgment of the "General Assembly" (Record, p. 21).

> "Whether the taxation shall be upon the shares of "incorporated State banks or upon their capital is "also left by the constitution to the General Assem- "bly, but whichever method is adopted, the law must "be so framed that the burden upon the capital in- "vested in the State bank will at least equal the bur- "den placed upon national bank shares. The most "convenient manner of accomplishing that result is "to tax the shares of both kinds of banks, State and "national, by the same sections of the statute, as is "now done in this State" (Record, p. 22).

This holding of the supreme court of Ohio clearly sustains the contention of the plaintiff in error, viz., that the constitution of Ohio requires a tax upon the property of banks.

The plaintiff in error submits that under these constitutional requirements *all property* of banks or trust companies organized under the laws of Ohio must be taxed; that the laws enacted for the listing and return of bank property must be construed as providing a method of fixing the value of such property or else be declared void in so far as they apply to such corporations.

POINT 2.

The history of the legislative enactment upon this subject shows clearly that the General Assembly has obeyed the mandate of the constitution and enacted laws for the taxing of all property of State banking institutions.

The laws in force at the time of the adoption of the present constitution relative to the taxation of banks were confused and lacked uniformity. They were changed immediately after the adoption of the present constitution and to conform with its requirements.

We call the court's attention to the legislative history of these enactments.

Volume 50, O. L., page 135. Section 19 of that enactment, page 144, reads as follows:

> "It shall be the duty of the president and cashier "of every bank or banking company that shall have "been, or may hereafter be incorporated by the laws "of this State, and having the right to issue bills for "circulation as money, to make out and return under "oath, to the auditor of the county in which such "bank or banking company may be situated, in the "month of May, annually, a written statement con-"taining,
>
> "1st. The average amount of notes and bills dis-"counted, or purchased by such bank or banking "company, which amount shall include all the loans "or discounts of such bank or banking company, "whether originally made or renewed during the "year aforesaid, or at any time previous; whether "made on bills of exchange, notes, bonds, mortgages, "or any other evidence of indebtedness, (at their "actual value in money) whether due previous to, "during, or after the period aforesaid; and on which "such bank or banking company has at any time re-"served or received, or is entitled to receive, any profit "or other consideration whatever, either in the shape "of interest, discount, exchange or otherwise.
>
> "2d. The average amount of all other moneys, "effects, or dues of every description belonging to "such bank or banking company, loaned, invested or "otherwise used or employed with a view to profit, or "upon which such bank or banking company re-"ceives, or is entitled to receive interest."

That act provided for a return of the *property* of the bank. Such *property* was then listed and taxed as other kinds of

property. That was the first expression of the legislature after the adoption of the present constitution. By that law the legislature carried into effect the intent of the framers of the constitution and the spirit and letter of the instrument, namely, taxing the *property* of the banking associations within the State. That law was changed in 1859 (56 O. L., page 201). There were two changes in the law, but neither of them affecting the point to which we wish to call the court's attention. They provided some further methods by which *property* was listed and placed on the tax duplicate against the bank itself—taxes being levied against the bank.

In 1861 (vol. 58, O. L., page 59) the law was further amended, and again the annual statement, as required to be filed by the officers of the bank, provided for a return of the *property* of the bank and a tax upon that *total property* allowing the ordinary deductions.

In 1867 (vol. 64, O. L., page 204) the law which practically is the present law was adopted by the legislature, and changed very materially the method of making the return of the *property* of the bank. This law, as we will show the court hereafter, was evidently the result of a decision of the United States court regarding the taxation of shares of national banks, and enacted for the purpose of taxing shares of national banks in accordance with the statutes of the United States.

Practically this law today is as then, and appears now as sections 2758 to 2769 of the Revised Statutes. At the time of the revision, 1880, the legislature simply rearranged the sections.

It is the contention of the plaintiff in error that these laws and the amendments thereto, being now sections 2762 to 2769, which have to do with incorporated banks, simply provide a method for fixing the value of the *property* of the State banks and not the value of the shares of the bank stock in the hands of the holders of those shares, as distinguished from the property of the bank.

Let us consider these sections seriatim.

Section 2762:

> "All the shares of the stockholders in any incorpo-
> "rated bank or banking association, located in this
> "State, whether now or hereafter incorporated or or-
> "ganized under the laws of this State, or of the United
> "States, shall be listed at their true value in money,
> "and taxed in the city, ward, or village where such
> "bank is located, and not elsewhere."

What do these words mean? They certainly are not listing or ordering to be listed the shares in the hands of the individual, else they would be listed in the place where the individual lives, as all other personal property is listed; the individual may own shares in any one of these said institutions, but he is not required to list that property where he lives. It is required to be listed by the bank in the place where the bank is located, and why? Because the people in that locality are entitled to taxation of the *property* of the banks within that locality. It is determining the value of the *property* of the bank. This form was used to meet the objection that had been raised in the State of New York upon the taxation of the shares of national bank stock.

Section 2763:

> "The real estate of any such bank or banking
> "association shall be taxed in the place where the
> "same may be located, the same as the real estate of
> "individuals."

This section follows the United States statute relating to national banks.

Sections 2764 and 2765 have to do with the form of the return.

Section 2764:

> "There shall at all times be kept in the office
> "where the business of such bank or banking asso-

"ciation is transacted, a full and correct list of the "names and residences of the stockholders therein, "and the number of shares held by each, which shall "be at all times during business hours open to the "inspection of all officers who are or may be author- "ized to list or assess the value of such shares for tax- "ation."

Section 2765:

"The cashier of each incorporated bank shall make "out and return to the auditor of the county in which "it is located, between the first and the second "Monday of May, annually, a report in duplicate, "under oath, exhibiting in detail and under appro- "priate heads, the *resources and liabilities of such bank*, "at the close of business on the Wednesday next pre- "ceding said second Monday, together with a full "statement of the names and residences of the stock- "holders therein, with the number of shares held by "each, and the par value of each share."

What would be the object of returning merely "the resources and liabilities of the bank" if it were sought to determine the value of the shares of stock? That value may be determined by the question of good will, good management, business conditions, or speculative possibilities, all entirely separate from the actual property of the bank.

The evident intent of this section is to provide the methods by which the *property* of the bank may be determined by the county auditor.

Section 2766:

"Upon receiving such report the county auditor "shall fix the total value of the shares of such banks "according to their true value in money, and deduct "from the aggregate sum so found the value of the

"real estate included in the statement of resources as "the same stands on the duplicate, and thereupon he "shall make out and transmit to the annual State "board of equalization for incorporated banks a copy "of the report so made by the cashier, together with "the valuation of such shares as so fixed by the "auditor."

What does that mean? True, it says that he shall fix the total value of the shares of such bank; but his valuation is determined by the report of the bank's resources and liabilities, and under the constitutional provisions he must fix the value of the property of the bank itself.

Why should a deduction of the assessed value of real estate be allowed if it were intended to assess the stock instead of the *property of the corporation?* As has been held in the courts on questions as to the shares of stock of the national banking associations and their taxation, no consideration is given to the character of the property of the corporation in determining the value of the shares of stock. Stock is a different kind of property, and we do not inquire into the character of the property which that stock represents if we seek to tax the stock itself; but this section shows the intent was to obtain the value of the *property* of the bank, and the proper allowance and deduction of the real estate, which bears its rate of taxation, is thus provided for.

The United States statute, section 5219, recognizes the distinction. The taxation of shares of stock in national banks is permitted under certain restrictions, but the real estate of the national bank is to be taxed as other real property is taxed, and no deduction from the value of its shares is required. The Ohio statute, in attempting to provide for the taxation of both national bank shares and the property of State banks under the same section, has confused the two distinct kinds of property. The legislature, being compelled

to tax the property of State banks, could not provide for a simple share tax, disregarding and exempting the property of the bank. The legislature under the constitution is required to provide for the taxation of the *property* of the bank. These sections simply provide a method of determining that value, except as they relate to national banks.

Leaving these sections for the moment, we call attention to sections 2808 and 2809, which provide for the State board of equalization for banks. Section 2809 is as follows:

> "Said board shall hear complaints and equalize "the value of said shares according to the rules pre- "scribed by their title for valuing and equalizing the "values of real and personal property, and if in the "judgment of the board, or a majority of them, *the* "*aggregate value of all the bank property* so reported to "said board by the county auditors is below its true "value in money, they may increase or diminish the "value of said shares by such a per cent. as will "equalize said shares to their true value in money; "provided that said board shall not increase or "reduce the grand aggregate value of bank shares as "returned by the several county auditors by more "than twenty (20) per centum."

The following clause therein, "and if in the judgment of "the board, or a majority of them, the aggregate value of "*all the bank property* so reported to said board by the county "auditors is below its true value in money," etc., again shows that the purpose of that board was to determine the valuation of the property of the bank, although nominally fixing the value of the shares.

And now let us compare these sections with those relating to unincorporated banks and bankers, and see how the legislature has interpreted the constitution regarding that class of business.

Section 2758:

"Every company, association, or person not incorporated under any law of this State or of the United States, for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks, or other evidences of indebtedness, with a view to profit, shall be deemed a bank, banker, or bankers, within the meaning of this chapter."

Section 2759 provides a form of return. There is a very good reason for this form of return. A private banker may be a partnership or he may be an individual. There is no capital stock. With the incorporated bank the certificate is filed with the secretary of state; it is a corporation created by the laws of the State by which we can regulate the transaction of its business, and therefore the cashier of that bank can be made to make his return in the form provided.

Section 2759:

"All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

"First. The average amount of notes and bills receivable, discounted or purchased in the course of business by such unincorporated bank, banker or bankers, and considered good and collectible.

"Second. The average amounts of accounts receivable.

"Third. The average amount of cash and cash items in possession or in transit.

"Fourth. The average amount of all kinds of

3

"stocks, bonds, including United States Government "bonds or evidences of indebtedness held as an in- "vestment, or in any way representing assets.

"Fifth. The amount of real estate at its assessed "value.

"Sixth. The average amount of all deposits.

"Seventh. The average amount of accounts pay- "able, exclusive of current deposit accounts.

"Eighth. The average amount of United States "Government and other securities that are exempt "from taxation.

"Ninth. The true value in money of all furniture "and other property not otherwise herein enumer- "ated.

"From the aggregate sum of the first five items "above enumerated the said auditor shall deduct the "aggregate sum of the fifth, sixth, seventh, and such "portions of the eighth items as are by law exempt "from taxation, and the remainder thus obtained "added to the amount of item nine shall be entered "on the duplicate of the county in the name of such "bank, banker or bankers, and taxes thereon shall be "assessed and paid the same as provided for other "personal property assessed or taxed in the same "city, ward or township."

What then is required? This return is made to the auditor, and the auditor deducts the aggregate sum of the fifth, sixth, and seventh and such portions of the eighth as are exempt from taxation. That is exactly what should be done by the auditor in taxing the incorporated banks. What does he deduct under this item? He deducts the Government bonds and such other bonds or stocks as are exempt from taxation. When that is done, the auditor fixes the net valuation, which, added to the amount of item nine, is entered on the duplicate in the name of such bank or bankers, and the taxes are assessed as provided for on other property.

The intention of that section is to fix the net valuation of unincorporated bank property, and it simply fixes it by a method different from that provided for in the case of the incorporated bank. To illustrate by a practical example under these sections: Five men are partners doing a business as unincorporated bankers. They deduct—or the auditor does it for them—their holdings in United States bonds from their other resources, and after the other deductions of bad debts, etc., he fixes the total value of the property of these men associated as private bankers. Supposing these five men organize an incorporated bank with the same property, with the same resources, with the same liabilities, how then do they make their return? They simply make their return by the cashier of the bank to the auditor. Will the court say, because they have become an incorporated, rather than an unincorporated institution, that by some mystic act of the law they shall then have their Government bonds taxed which were not taxed when they were unincorporated bankers?

If the contention of the defendant in error is sustained, there would result gross injustice. This construction of the law would violate the provision of the constitution that there must be uniformity in taxation, to which we will hereafter call attention. The conclusion must be, in reading these two forms of return, that they are simply provisions for getting at the value of the *property* of the bank in the most direct and satisfactory way. We have various other forms or methods for arriving at the value of corporate property. Under section 2734 of the Revised Statutes of Ohio, which defines who shall list personal property for taxation, the following provision appears:

> "of every company, firm or corporation by the presi-
> "dent or principal accounting officer, partner or agent
> "thereof; and all surplus or undivided profits held
> "by any society for savings or bank having no capital
> "stock, by the president or principal accounting
> "officer."

The railroads have a far different method for fixing the value of their property, being provided for under section 2770 *et seq.* of the Revised Statutes; the express, telegraph, and telephone companies a still different method provided for under section 2777 *et seq.*; manufacturers a still different method provided for under section 2742, and the insurance companies by section 2745 of the Revised Statutes of Ohio; but every method has for its object the determination of the property of the corporation as required under the constitution.

The supreme court of Ohio has sustained the doctrine that it is the property of State banks which is subject to taxation.

Exchange Bank of Columbus *vs.* Hines, 3 O. S., 1.

Page 7:

> "The third section of the twelfth article of the constitution, which confers the authority for taxing "property employed in banking, is as follows:
>
> "'The General Assembly shall provide by law, for "'taxing the notes and bills discounted or purchased, "'moneys loaned, and all other property, effects or "'dues, of every description, without deduction, of "'all banks now existing, or hereafter created, and of "'all bankers; so that all property employed in banking shall always bear a burden of taxation equal to "'that imposed on the property of individuals.'

Page 29:

> "The third section of the twelfth article of the constitution heretofore recited, provides, that all property, effects, or dues of every description of *all banks*, "and of *all bankers*, shall be taxed, *without deduction*. "There has been much controversy as to the true interpretation of this provision of the constitution. "The section of the constitution immediately preced-

"ing this third section, provides for taxing *all property* "of every form and description, excepting the subjects "of the few specified exemptions; and it has been said, "that there could have been no object whatever in "the third section, unless it was to tax banks and "bankers in a different mode or upon a different "principle from that which was applicable to other "persons. I am inclined to the opinion, however, "that the history of the legislation of the State on the "subject of taxation for some years prior to the adop- "tion of the constitution, as well as the circumstances "attending its formation, very plainly indicate the "purpose of this third section. Not only the *policy*, "but also the *right* of taxing *capital* employed in "banking, had been strenuously contested, and to a "considerable extent, successfully resisted. There "had also been much controversy as to the form of "property employed in banking, which should con- "stitute a basis of taxation. With a view, therefore, "of putting an end to controversy on this subject, "and of defining, with certainty, the form in which "property in this branch of business should be made "a basis for taxation, this third section was inserted "in the constitution." * * *

Page 46:

"But it is asked, Why was section three inserted "at all, if it was not intended to establish a rule as to "banks and bankers, different from the rule respect- "ing individuals? With more propriety I might "ask, Why was section four of article three inserted, "which provides that 'the property of corporations "now existing, or hereafter created, shall forever be "subject to taxation, the same as the property of in- "dividuals?' There was no absolute necessity for "this section, for without it, section two, of article

"twelve, would have embraced these corporations. "But it was inserted out of abundant caution, that "there might be no doubt either as to existing or "future corporations, what would be the rule of tax- "ation. So section three was inserted, that there "might be no doubt how existing, as well as future "banks and bankers, whether incorporated or unin- "corporated, were to be taxed; that there might be "no doubt what property of theirs was to be the ob- "ject of taxation; and, further, to deprive them of "even the $200 exemption which may be permitted "to individuals, under section two. And hence it is "that we find in it the words 'without deduction.'"

It is true that since the decisions of Exchange Bank *vs.* Hines the present law was passed, but this law does not change the underlying principles announced by that case that the property of the bank is the property which, under the constitution, is subject to taxation. The supreme court, in discussing this phase of the case at bar, holds:

"Having passed a law for the taxation of all shares, "that is all stocks of incorporated banks, it (the "General Assembly) repealed the law taxing the "capital or property of the bank so as to conform to "the last sentence in section 3, article XII of the con- "stitution, which says, 'so that all property employed "in banking shall always bear a burden of taxa- "tion equal to that imposed upon the property of indi- "viduals.' The shares of stock in a bank are per- "sonal property, and are employed by the owner in "banking, and therefore should be taxed the same as "the property of individuals" (Record, p. 20).

By this reasoning the court confuses two separate and distinct kinds of property which are recognized through the other parts of the same decision, namely, the property of the

bank is one kind of property, separate and distinct from the shares of stock in the bank which are the property of the individual. The property of the bank "is employed in banking," but the shares of stock as owned by the individual shareholder are property which is not employed in banking, but simply represents a certain undivided interest in the bank property.

The Ohio supreme court still further confuses these distinct kinds of property. It held:

> "To also tax the property of the bank less the "Government bonds owned and held by it, would "reduce the dividends to be received by the share- "holder or stockholder, and would by such double "taxation impose greater burdens upon the property "employed in banking than upon the property of in- "dividuals" (Record, p. 21).

Yet, in the same decision, the court held:

> "If the tax was on the capital, the Federal bonds "would have to be deducted, but being upon the "shares no such deduction is required, allowed or au- "thorized. A State has the power to tax both the cap- "ital and stock or shares of a corporation unless pro- "hibited by its constitution, and to do so would not "be double taxation" (Record, pp. 17, 18).

And, further:

> "So as to other corporations, the General Assembly "could pass laws under section 2 of article XII taxing "the stocks of the corporation in the hands of its "stockholders, and also taxing the property of the "corporation less the non-taxable bonds owned and "held by it; but section 4 of article XIII steps in "and limits and restricts the power so granted by "section 2 of article XII by providing that the tax-

"ation of the property of corporations shall be the "same as on that of individuals."

"Aside from the limitations and restrictions in said "sections three and four, the General Assembly might "tax both the stocks and property of banks and cor- "porations, less untaxable bonds, without thereby "imposing double taxation. It is because of said "limitations that it is provided in section 2746 R. S. "(Ohio) that where the capital stock of a corporation "is taxed in the name of the company, that the stock "shall not be taxed and for a like reason that no pro- vision is made for the taxation of the capital of in- "corporated State banks when the shareholders are "taxed on their shares" (Record, p. 21).

Is it not evident that the supreme court is thus attempting to hold that the tax upon the shares of a bank *eo nomine* is in fact a tax upon the corporate property, and hence in conformity with the Ohio constitution, yet at the same time holding that, as it is a tax *eo nomine* upon the shares, therefore, for the purpose of taxation, the character of the property of the bank must not be considered?

The supreme court of Ohio in recent decisions has accepted the doctrine announced in the case of Bank *vs.* Hines.

Treasurer *vs.* Bank, 47 O. S., 503.

On page 518 the court sustains fully the doctrine set forth in that case, and quoting the above passages, holds, page 519:

"But the standard of equality and uniformity in "taxation has been established by the constitution, "for corporations and individuals alike, and except- "ing the special exemptions from taxation mentioned "in the constitution, the rule for taxation as to banks "and bankers is not different from the rule as to "individuals."

Chapman *vs.* National Bank of Wellington, 56 O. S., 310:

The court in the Chapman case, in considering the claims of an individual to deduct debts from the value of national bank shares, fully recognizes the principle for which this plaintiff in error contends, namely, that the object of the taxing laws of Ohio is to reach the valuation of the property of State banks.

Pages 328 and 329:

> "But in this State both national and State banks "are taxed under the same section, being section 2762, "Revised Statutes, and in fixing the values of the "shares, the bank deducts its debts from its credits, "so that it pays taxes only on the net valuation. "Unincorporated banks are taxed in the same man- "ner, by deducting debts from credits, so as to pay "only on the net capital stock."

From these decisions it is clear that the supreme court of Ohio has construed the various tax laws of the State as various methods provided by the legislature to carry into effect the plain mandate of the constitution that all property of banks shall be taxed.

POINT 3.

A tax upon the shares of stock of a corporation in the hands of the owner is a tax upon a kind of property separate and distinct from the property of the corporation itself, and such a tax is not equivalent to a tax upon the property of the corporation. Hence if the tax herein complained of be held to be a tax upon shares, it follows that it is unconstitutional in that thus the property of the corporation is exempted from taxation in violation of section 3, article XII, of the constitution of Ohio.

This court has long and uniformly recognized the distinction between the property of the corporation and the property of the shareholder in the shares of stock of the corporation.

Van Allen *vs.* Assessors, 3 Wall., 573.
People *vs.* Commissioners, 4 Wall., 244.
Shelby Co. *vs.* Union Bank, 161 U. S., 149.

The rule is clearly stated by this court in the case last cited, page 154.

> "* * * The fact is well established by the de-
> "cisions of this as well as many State courts, that
> "there is a clear distinction between the capital stock
> "of a corporation and the shares of stock of such cor-
> "poration in the hands of its individual sharehold-
> "ers. So separate are these properties, and so dis-
> "tinct in their nature, that the taxation of the one
> "property is not the taxation of the other."

This distinction being recognized, it follows that the taxation of shares is not equivalent to the taxation of the property of the corporations.

This proposition as to equivalency has been definitely determined by this court for many years; a recent decision states the rule clearly:

Owensboro Nat. Bk. *vs.* Owensboro, 173 U. S., 664.

P. 676 :

"It is, however, urged that whilst the taxes may "not be in form imposed on the shares of stock in "the names of the shareholders, and may be in form "a tax on the franchise or property of the bank, "nevertheless they are equivalent to a tax on the "shares of stock in the names of the shareholders, and "therefore do not violate the act of Congress. But "this proposition concedes that the taxing statute "does not conform to the act of Congress, and yet in- "vokes its permissive authority since, as already "shown, without the grant made by the act of Con- "gress there would be no power to tax at all. Pass- "ing, nevertheless, this contradiction, and looking "beneath the mere form, we come to the substance "of things. The alleged equivalency, in order to be "of any cogency, must of necessity, contain two dis- "tinct and essential elements—equivalency in law "and equivalency in fact. Does it contain either is "the question.

"To be equivalent in law involves the proposition "that a tax on the franchise and property of a bank "or corporation is the equivalent of a tax on the "shares of stock in the names of the shareholders. "But this proposition has been frequently denied by "this court, as to national banks, and has been over- "ruled to such an extent in many other cases relating "to exemptions from taxation, or to the power of the "States to tax, that to maintain it now would have "the effect to annihilate the authority to tax in a "multitude of cases and as to vast sums of property "upon which the taxing power is exerted in virtue of "the decisions of this court holding that a tax on a "corporation or its property is not the legal equiva- "lent of a tax on the stock, in the names of the "stockholders."

In the light of these cases, if it be held that the Ohio laws impose simply a tax upon the shares of State banks, clearly the property of the bank is exempt from all taxation, and the mandatory provisions of the constitution are violated. It was claimed by counsel for defendant below that such exemption was not injurious to the rights of this plaintiff in error; hence it could not complain, but such is not the case. The injury is clear. Under the Ohio constitution all bank property shall be taxed, and this plaintiff in error is entitled to deduct from its property the value of United States Government bonds. The legislature attempts to tax the shares of this plaintiff in error, thereby preventing the deduction of its Government bonds from the value of its shares, doing indirectly that which cannot be done directly. Therefore such an attempt should be declared unconstitutional and void.

The decision of the supreme court in the case at bar avoids a determination of this important point. While admitting that the constitution requires banking property to be taxed, it evades the logical and necessary conclusion that a law exempting such property is void, and justifies such law on the ground that the tax imposed is equivalent to a property tax.

It is admitted that if there were no constitutional mandate as to the taxation of banking property there could be no objection to the substitution of a share tax for a corporate tax; but it is claimed that because of this special constitutional provision such a share tax cannot be substituted by the legislature of Ohio for a tax upon bank property. It will be found that the constitution of Ohio is unique in this special provision for taxing State bank property, and hence the point here presented has not been before this court. This court cannot properly be asked to sustain a law which, by an evasion of State constitutional provision, permits the violation of a Federal statute, even though such

evasion of the State constitution be permitted by the supreme court of such State.

POINT 4.

If it be held that the tax provided for under sections 2762 and 2769 be an equivalent to a tax upon the property of the corporation, then it must follow that all bonds of the United States owned by the bank may be deducted in fixing the value of the shares.

The Supreme Court of the United States first determined this question in the

Bank Tax case, 2 Wall., 200.

The syllabus of the case is as follows:

> "A tax laid by a State on banks, 'on a valuation
> "'equal to the amount of their capital stock paid
> "'in, or secured to be paid in,' is a tax on the prop-
> "erty of the institution; and when that property
> "consists of stocks of the Federal Government, the
> "law laying the tax is void."

Page 208:

> "Now, when the capital of banks is required or
> "authorized by the law to be invested in stocks, and,
> "among others, in United States stock, under their
> "charters or articles of association, and this capital
> "thus invested is made the basis of taxation of the
> "institutions, there is great difficulty in saying that it
> "is not the stock thus constituting the corpus or
> "body of the capital that is taxed. It is not easy to
> "separate the property in which the capital is in-
> "vested from the capital itself. It requires some re-
> "finement to separate the two thus intimately blended
> "together. The capital is not an ideal, fictitious,

> "arbitrary sum of money set down in the articles of "association, but, in the theory and practical opera- "tion of the system, is composed of substantial prop- "erty, and which gives value and solidity to the "stock of the institution. It is the foundation of its "credit in the business community."

National Bank *vs.* Commonwealth, 9 Wall., 353, page 359, the court held:

> "This capital may consist of cash, or of bills and "notes discounted, or of real estate combined with "these. The whole of it may be invested in bonds "of the Government, or in bonds of the States, or in "bonds and mortgages. In whatever it may be in- "vested, it is owned by the bank as a corporate en- "tity, and not by the stockholders. A tax upon this "capital is a tax upon the bank, and we have held "that when that capital was invested in the securities "of the Government, it could not be taxed, nor could "the corporation be taxed as the owner of such se- "curities."

This doctrine of equivalency has been uniformly sustained: a tax must be either a property tax or a share tax. If it be *eo nomine* a share tax, but in fact be equivalent to a property tax, it is a property tax. The amounts obtained from a share tax and a property tax may be equivalent without affecting the character of the tax, but the two forms of tax cannot be equivalent as they are imposed upon entirely different kinds of property. The supreme court of Ohio in the case at bar evidently attempts to sustain the power of the legislature to impose a share tax by holding that such a tax is equivalent to the property tax required by the constitution; they thereby acknowledge the tax to be a property tax. Hence, Government bonds should be deducted from the bank property for purpose of taxation.

POINT 5.

Unless incorporated banks and trust companies organized under the laws of Ohio are permitted to deduct Government bonds from their resources for the purpose of taxation, there is a gross discrimination in favor of unincorporated banks and bankers.

Section 2, article 12, of the constitution is as follows:

> "Laws shall be passed, taxing by a uniform rule, "all moneys, credits, investments in bonds, stocks, "joint-stock companies, or otherwise; and also all "real and personal property, according to its true "value in money; but burying grounds, public school-"houses, houses used exclusively for public worship, "institutions of purely public charity, public prop-"erty used exclusively for any public purpose, and "personal property, to an amount not exceeding in "value two hundred dollars, for each individual, "may, by general laws, be exempted from taxation; "but all such laws shall be subject to alteration or "repeal; and the value of all property, so exempted, "shall, from time to time, be ascertained and pub-"lished, as may be directed by law."

One of the ablest interpretations of the meaning of this section was given by the supreme court of Ohio in the case of The Exchange Bank *vs.* Hines, 3 O. S., 10:

> "The manifest effect of this constitutional provis-"ion, is to make *property* the basis, and the *sole basis* "of taxation. And the object being equality and "fairness, it requires, by a true interpretation:
>
> "1. That the taxes shall be assessed on all prop-"erty in the State, except the subjects of the specified "exemptions.
>
> "2. That the taxes shall be assessed on all property, "by a uniform rule. And,

"3. That all taxable property shall be taxed at its "true value in money."

Page 15:

"What is meant by the words, 'taxing by a uni- "form rule?' And to what is the rule applied by "the constitution? No language in the constitution, "perhaps, is more important than this; and to ac- "complish the beneficial purposes intended, it is es- "sential that they should be truly interpreted, and "correctly applied. 'Taxing' is required to be 'by a "uniform rule,' that is by one and the same unvary- "ing standard. Taxing by a uniform rule requires "uniformity, not only in the rate of taxation, but also "uniformity in the mode of the assessment upon the "taxable valuation. Uniformity in taxing implies "equality in the burden of taxation; and this equality "of burden cannot exist without uniformity in the "mode of the assessment, as well as in the rate of tax- "ation."

As defined by the supreme court of Ohio, "uniformity in taxing implies equality in the burden of taxation."

How can it be successfully maintained that there is equality if an unincorporated banker is allowed to deduct holdings in Government bonds from his total capital while the incorporated bank is not permitted to make such deduction in determining the value of its property?

As has been shown by reference to the 47 O. S., 518, and the Wellington case, 56 O. S., 328, this court has held that both incorporated and unincorporated banks should be taxed so as to pay only on the net valuation of their property. Hence deductions of non-taxable Government securities should be permitted in each case.

The lack of uniformity complained of was set forth in the

original petition of this plaintiff in error and admitted by the demurrer (Record, pp. 3, 6).

The supreme court of Ohio, in the case at bar, held as follows on this point:

> "As unincorporated banks are allowed to deduct "their non-taxable bonds from their assets, and in- "corporated banks are not allowed to make such de- "ductions in fixing the amount upon which the value "of the shares is calculated, it is urged that there is "an inequality in taxation produced thereby which "violates that principle of the constitution which "aims at equal taxation. Whether this produces "such inequality as calls for a remedy it is impossi- "ble to determine. The unincorporated bank pays "taxes on all of its property except non-taxable bonds, "while the value of the shares of the incorporated "bank is based upon the value in money of the tangi- "ble property of the bank, including such bonds, but "nothing is added under our statute for the value of "the franchise and privilege of carrying on a corpo- "rate business. This intangible and untaxed prop- "erty of the corporation may, and often does, exceed "the value of the non-taxable bonds held by unin- "corporated banks or individuals, and in some of the "States heavy taxes are imposed on such property. "The two kinds of banks cannot well be assessed by the "same statute, because the unincorporated bank has "no shares, no franchise, and no privilege to carry on "a corporate business in which there is only a lim- "ited liability for the debts of the bank. Both are to "be so taxed as to bear a burden equal to that borne "by individuals, and the obligation is upon the Gen- "eral Assembly to pass laws to that end" (Record, p. 19).

Does not the court thus disclose the unsoundness of its decisions? There is no difficulty in assessing both kinds of banks with equality and uniformity if the constitutional mandate for taxing property is obeyed; the difficulty arises when an effort is made to harmonize a share tax with the constitution. If incorporated bank property is exempted and a share tax imposed, of necessity all possibility of constitutional uniformity is gone.

POINT 6.

The property of an Ohio corporation being subject to tax, the shares of stock of such corporation in the hands of the owner are exempted from taxation.

Shares of stock are recognized in Ohio as personal property and as such are subjected to taxation in the hands of owners unless exempted by section 2746 of the Revised Statutes, which is as follows:

> "Personal property of every description, moneys
> "and credits, investments in bonds, stocks, joint-stock
> "companies, or otherwise shall be listed in the name
> "of the person who was the owner thereof on the day
> "preceding the second Monday of April, in each year;
> "but no person shall be required to list for taxation
> "any share or shares of the capital stock of any com-
> "pany, the capital stock of which is taxed in the
> "name of such company."

This section has been considered in—

Jones *vs.* Davis, 35 O. S., 474.

That case established the rule, which is now recognized in Ohio, of exempting the shares of stock of Ohio or domestic corporations in the hands of the holders of that stock. That case also recognized directly a principle for which we con-

tend in the present case, namely: When the property of the corporation is, or is required to be, taxed, the shares of the corporation in the hands of the holders are exempt from taxation.

Page 476:

"The Toledo and Wabash Elevator Company is incorporated under the laws of Ohio, and whether or not the property which it was thus required to list for taxation embraced its capital stock within the meaning of the statute is the principal question arising upon the record.

"That it did embrace it we entertain little doubt. The capital stock of a corporation consists of the money and property subscribed and paid in for the purpose of carrying on its business operations. It constitutes a corporate fund, belonging to the corporate body. The ownership of a share of stock involves the right to participate in the dividends declared from the profits of the business, and upon the dissolution of the corporation to a proportionate share of the fund remaining after payment of the corporate debts. This interest or right, however, does not enable the shareholder to withdraw any portion of the capital stock of the corporation from its control, nor to exercise any authority over it, further than to participate, to the extent of his stock, in the election of a board of managers, charged with the conduct of the business for which the corporation was created.

"The fund subscribed and paid in to carry out the purposes of the organization remains the capital stock of the company as fully, within the meaning of the statute, after it has been converted into property necessary for its business operations, and for which it was subscribed, as before. * * * *For*

"*the purpose of taxation, the capital stock is represented*
"*by whatever it is invested in.*"

Page 478:

"Except in cases where the capital stock is taxed
"in the name of the corporation, the shares are to be
"listed in the name of the person owning the same
"on the day preceding the second Monday of April
"in each year; but when the *capital stock is required*
"*to be returned for taxation* in the name of the com-
"pany, the owner of the shares is expressly relieved
"from the duty to list them."

If property of a corporation is subject to tax, but by some error or omission is not placed upon the tax duplicate, the rule still obtains, and the shareholder cannot be made to suffer by reason of the neglect of a public officer.

Hubbard, treasurer, *vs.* Brush, 61 O. S., 252, p. 262:

"Although the language of that section in terms
"exempts corporate shares from taxation only where
"the capital stock is taxed in the name of the com-
"pany, yet if all of it was by law taxable, but by the
"neglect of assessing or corporate officers was not
"taxed, there would, nevertheless, be strong ground
"to hold that the shares would be exempt from taxa-
"tion in the hands of its unoffending owners, and the
"public remitted for relief against the corporation
"under the laws that provide for correcting false
"returns."

Applying this rule to the case at bar, the constitution requires that the property of this plaintiff in error must be taxed; hence, even though this property were omitted from taxation, yet the shares in the hands of its individual stockholders would be exempt. This extreme condition, how-

ever, does not exist. This plaintiff in error made a return of its taxable property. It simply deducted from its total property its holding in Government bonds.

All its property subject to taxation is upon the duplicate; hence to hold that its shares of stock are liable to tax as distinct property in the hands of its holders is a violation of section 2746, Revised Statutes of Ohio. The construction of this section by the Ohio supreme court still further shows the error in attempting to maintain that the property of a State bank is not subject to taxation.

POINT 7.

The taxation of the shares of national banks is permitted by the Congress of the United States and must be imposed in a certain definite way, namely, by a tax upon the shares and not upon the property of the bank.

The national bank tax decisions do not govern or control the question at issue in this case.

The imposition of a tax upon the shares of national banks does not prevent the taxation of the property of State banks.

I. The shares of national banks may be taxed by the States by reason of an express enabling act passed by the Congress of the United States and without regard to Government bonds owned by the bank.

Section 5219 of the U. S. Statutes:

> " * * * but the legislature of each State may " determine and direct the manner and place of tax- " ing all the shares of national banking associations " located within the State, subject only to the two re- " strictions, that the taxation shall not be at a greater " rate than is assessed upon other moneyed capital in " the hands of individual citizens of such State, and " that the shares of any national banking association,

"owned by non-residents of any State, shall be taxed "in the city or town where the bank is located and "not elsewhere." * * *

Owensboro National Bank *vs.* Owensboro, 173 U. S., 664:

This court in discussing this question held, p. 668:

"It follows then necessarily from these conclusions "that the respective States would be wholly without "power to levy any tax, either direct or indirect, "upon the national banks, their property, assets or "franchises, were it not for the permissive legislation "of Congress."

Under this act only two restrictions are placed upon the States in taxing the shares of national banks. Neither of these restrictions provides for the deduction of the investment of the bank in Government bonds, and the context shows that by the word "shares" is meant the full interest of the shareholders. Therefore the States are permitted to tax the shares without deduction.

State *vs.* Haight, collector, 31 N. J. Law, 399:

After deciding that apart from the statute the shareholders in a national bank could not be taxed on their shares without deduction for the investment of the bank in United States Government bonds, the court held, in discussing the United States statute, p. 414:

"But it is to be noticed that the provision in ques- "tion does not attempt to impose a liability to tax- "ation on the loans to the Government. Its effect is "this. It withholds from the corporation which itself "creates, a privilege which other persons possess. In "the hands of individuals, the national securities are "not liable to State taxation; in the hands of the "national banks, it is imposed as a condition to their

"existence, that such securities shall become taxable "through their shareholders."

See also State Mutual Life & Casualty Co. *vs.* Haight, 34 N. J. Law, 128.

Van Allen *vs.* Assessors, 3 Wall., 573, page 582:

"In the granting of chartered rights and privileges "by Government, especially if of great value to the "corporators, certain burdens are usually, if not gen- "erally, imposed as conditions of the grant. Accord- "ingly, we find them in this charter. They are very "few, but distinctly stated."

The court then decides that as an incident to the grant, the State is given the right to tax the shares but not the property, a proposition which is clear and indisputable; the court proceeds, page 586:

"Then as to the shares, and what is intended by "the use of the term? The language of the act is "equally explicit and decisive." * * *

"Now in view of these several provisions in which "the term shares and shareholders are mentioned, "and the clear and obvious meaning of the term in "the connection in which it is found, namely: the "whole of the interest in the shares and of the share- "holders; when the statute provides that nothing in "this act shall be construed to prevent all the shares "in any of the said associations, etc., from being in- "cluded in the valuation of the personal property of "any person or corporation in the assessment of taxes "imposed by State authority, etc., can there be a "doubt but that the term 'shares,' as used in this "connection, means the same interest as when used "in other portions of the act?" * * *

"In all these instances, it is manifest that the term,

"as used, means the entire interest of the shareholder;
"and it would be singular, if in the use of the term in
"the connection of State taxation, Congress intended a
"totally different meaning, without any indication of
"such intent."

"This is an answer to the argument that the term,
"as used here, means only the interest of the share-
"holder as representing the portion of the capital, if
"any, not invested in the bonds of the Government;
"and that the State assessors must institute an inquiry
"into the investment of the capital of the bank, and
"ascertain what portion is invested in these bonds, and
"make a discrimination in the assessment of the shares.
"If Congress had intended any such discrimination, it
"would have been an easy matter to have said so. Cer-
"tainly, so grave and important a change in the use of
"this term, if so intended, would not have been left to
"judicial construction."

"Upon the whole, after the maturest consideration
"we have been able to give to this case, we are satis-
"fied that the States possess the power to tax the
"whole of the interest of the shareholder in the
"shares held by him in these associations, within
"the limit prescribed by the act authorizing their
"organization. * * *"

The quotations from the above decisions show conclusively that the power granted to the States to tax the interest of the shareholders without deduction for Government bonds owned by the bank is not based upon the technical distinction between shares and property, but upon a construction of the word "shares" as used in the statutes—that is, the share being the whole interest of the shareholder. It is clear that the reasoning of the court recognizes that the whole interest of the share, including as it did the invest-

ment of the Government bonds, could not be taxed except under the direct permission thus granted by Congress.

Furthermore, this court, in the matter of real estate, recognizes that the right to tax the shares of national banks does not rest upon the distinction between shares and property, but upon the direct permission granted by Congress.

In the case of the Commercial Bank *vs.* Chambers, 182 U. S., 556, in considering the method of taxation of the shares of national banks under the constitution and statutes of Utah, by the terms of which the value of the real estate situated in Utah is deducted from the assessment of the shares, the court held (page 561):

> "Manifestly, the purpose was to prevent double "taxation by the State, a tax on the real estate as "such and a further tax thereon by a tax on the "stock to the extent that such real estate entered "into the value of the stock."
>
> See also City Bank of Paducah *vs.* Paducah, 2 Flippin, 75.

If real estate must be deducted in estimating the value of shares for the purpose of avoiding double taxation in States where double taxation is prohibited, it follows that such a tax on the shares is, in fact, a tax upon the property. If real estate must be deducted to prevent double taxation, is it not a necessary and logical conclusion that United States Government bonds must be likewise deducted, as the tax on the share is an indirect tax upon such bonds to the same extent and in the same manner as it is a tax upon the real estate? The only reason such a deduction is not made in the taxation of shares of national banks is that Congress has so provided, but that provision does not apply to the shares of stock of any other corporation.

II. Apart from the statutory permission granted by Congress, there is no power in the States to tax the shares of cor-

porations unless, in estimating the value of such shares, the Government bonds owned by the corporation are deducted.

(*a.*) The reason of the rule in the case of a direct tax on the bonds is that an opposite rule would result in interference with the power of the Government to borrow.

(*b.*) Such a result would likewise follow from the taxation of corporate shares.

Weston *et al. vs.* The City Council of Charleston, 2 Peters, 449:

The court held that a tax imposed by a law of any State of the United States or under authority of such a law on stock issued for loans to the United States is unconstitutional.

The court, speaking by Mr. Justice Marshall, said (page 468):

> "* * * The American people have conferred "the power of borrowing money on their Govern- "ment, and by making that Government supreme, "have shielded its action, in the exercise of this power, "from the action of the local governments. The grant "of the power is incompatible with a restraining or "controlling power, and the declaration of supremacy "is a declaration that no such restraining or control- "ling power shall be exercised.
>
> "The right to tax the contract to any extent when "made, must operate upon the power to borrow be- "fore it is exercised, and have a sensible influence on "the contract. The extent of this influence depends "on the will of a distinct government. To any ex- "tent, however inconsiderable, it is a burthen on the "operations of Government. It may be carried to an "extent which shall arrest them entirely.
>
> "It is admitted by the counsel for the defendants, "that the power to tax stock must affect the terms on "which loans will be made; * * *"

Page 469:

"The tax on Government stock is thought by this "court to be a tax on the contract, a tax on the power "to borrow money on the credit of the United States, "and consequently to be repugnant to the constitu- "tion."

In Bank of Commerce *vs.* New York City, 2 Black, 620, the court affirms Weston *vs.* City of Charleston, and interprets that decision as follows (page 631):

"Upon looking at the case of Weston *vs.* The City "of Charleston, it will be seen that the decision of a "majority of the court was not at all placed upon "the distinction we have been considering, but upon "ground much broader and wholly independent of it.

"The tax upon the stocks was regarded as a tax "upon the exercise of the power of Congress 'to "borrow money on the credit of the United States.' "The exercise of this power was interfered with to "the extent of the tax imposed by the city authorities, "that the liability of the certificates of stock to taxa- "tion by a State in the hands of an individual affected "their value in the market, and the free and unre- "strained exercise of the power."

This decision was affirmed in the Bank Tax case, 2 Wall., 200.

State Mutual Life and Casualty Company *vs.* Haight, 34 N. J. Law, p. 128:

The court held that a tax levied upon capital stock of a corporation could not be levied upon its investment in United States bonds.

By the court (page 129):

"The exemption from the power of State taxation "of corporate capital when invested in such securities

"to the extent of the investment in the absence of "congressional permission to tax it, as in the case of "the national banks, is also so clearly established, "both by decisions in the courts of the United States, "and in this State, whenever the tax is sought to be "imposed upon the stock against the corporation *or* "*in the hands of the individual owners* as to render un- "necessary any further discussion of the question."

In State, North Ward National Bank, pros., *vs.* City of Newark, 39 N. J. Law Rep., 380, at p. 382:

By DEPUE, *Justice*:

"The exemption of a corporation created as one "of the agencies of the Federal Government from "taxation by the States is dependent not upon the "nature of the agent, nor upon the mode of its "constitution, but upon the effect of the tax, whether "the tax does in truth deprive it of the power "to serve the Government, as it was intended to "serve it, or hinder the efficient exercise of its "powers." * * *

Page 382:

"In McCullough *vs.* Maryland (4 Wheaton, 316) "it was held that the bank of the United States "which was incorporated by act of Congress, was "taxable by the State of Maryland on lands which "were the property of the bank in common with "other real property in the State, and that citizens of "the State might also be taxed on the interest which "they held in the bank, in common with other "property of the same description throughout the "State."

Page 383:

> "The power of the State to tax in the hands of "stockholders the stock of national banks which is "invested in Federal securities rests upon different "grounds, the States have no inherent powers of tax- "ation in that respect. Whatever powers they have "of taxation in that form is derived exclusively from "the authority conferred by Congress." * * *

To be specific, if for the purpose of taxation the Government bonds owned by the Cleveland Trust Company cannot be deducted from the assessed valuation, a tax burden is placed upon those bonds; and in case future bonds are issued by the Government, the Cleveland Trust Company would decrease its bid for such bonds in the amount of such added tax burden and to the same extent as though the tax were imposed directly upon the bonds.

The want of power of the States to tax either directly or indirectly United States Government bonds, except under direct authority of Congress, is based upon the soundest principles of public policy, and the reasons which led to the earlier decisions are as strong today, if not stronger, than when they were first stated. The fact that individual enterprise is rapidly being superseded by corporate enterprise means that in the future Government bonds will be more and more bought and held by corporations. If the distinction upon which the permission to tax shares without deducting the value of Government bonds rests solely on the difference between shares and property, then the States, by taxing the shares of any corporation without allowance for the investments of the corporation in Government bonds, can just as effectually limit the power of the Government to borrow as by a direct tax on the bonds themselves. The effect of the Bank Tax case, 2 Wall., 200, will be nullified if the States are permitted to impose such taxes.

The words of Chief Justice Marshall, in Weston and others

vs. The City Council of Charleston, 2 Peters, 449, at page 465, should not be forgotten in this connection:

> "But it is unnecessary to pursue this principle "through its diversified application to all the contracts "and to the various operations of government. No one "can be selected which is of more vital interest to the "community than this of borrowing money on the "credit of the United States. No power has been con- "ferred by the American people on their Government, "the free and unburthened exercise of which more "deeply affects every member of our Republic. In "war, when the honour, the safety, the independence "of the nation are to be defended, when all its re- "sources are to be strained to the utmost, credit must "be brought in aid of taxation and the abundant "revenue of peace and prosperity must be anticipated "to supply the exigencies, the urgent demands of the "moment. The people, for objects the most important "which can occur in the progress of nations, have "empowered their government to make these antici- "pations, 'to borrow money on the credit of the "United States.' Can anything be more dangerous "or more injurious than the admission of a principle "which authorizes every State and every corporation "in the Union which possesses the right of taxation, "to burthen the exercise of this power at their dis- "cretion."

III. The supreme court of the State of Ohio seems to have based its decision upon the supposition that the taxation of shares of national banks was necessary, and that the act of Congress permitting the taxation of such shares is of greater force than the mandate of the Ohio constitution requiring the taxation of bank property. That court held:

> "It is urged against the Van Allen case, and other "like New York cases, that they are not applicable

"in this State, because New York has no constitu-
"tional provisions like ours in reference to taxation.
"By this is meant that New York was not hindered
"by such constitutional limitations and restrictions,
"and was therefore free to pass laws conforming to
"the principles of the Van Allen case, while Ohio is
"so restricted by its constitution as to make it im-
"possible to conform to that case. As the Constitu-
"tion of the United States, and the acts of Congress
"passed in pursuance thereof, are the supreme law of
"the land, it may well be doubted whether the con-
"stitution of a State is of sufficient vigor to serve as
"an excuse for not conforming to the acts of Congress.
"Should we be unable to conform to section 5219 and
"the Van Allen case, we would be denied the right
"to tax national bank shares. Such shares being
"personal property, are required to be taxed under
"the provisions of our constitution; and if the claim
"of the plaintiff in error is right, in this regard, it
"would lead to the absurd result, that by reason of
"our constitution, we cannot tax such shares, and by
"reason of the same instrument we must tax them"
(Rec., p. 18).

Thus it appears that the court considers the question of taxation of the shares of national banks rather than the question at issue in the case. The court expresses the fear that the State would lose the power to tax the shares of national banks if the deduction of Government bonds from the property of State banks for the purpose of taxation is permitted.

The court held (Rec., p. 16):

"To allow incorporated State banks to deduct their
"Government bonds from their returns for taxation,
"and deny that right to national banks, would be to
"compel the latter to pay greater taxation on the

> "same investment than the former. To prevent such "a result was the object of said section 5219. It, "therefore, follows that in order to retain the right "to tax national bank shares without deducting the "bonds held by the bank from its return, we must "in like manner tax the shares of incorporated State "banks, or else impose a tax of equal amount upon "the property of State banks."

We submit that the question at issue in this case must be determined regardless of the effect it may have upon the power of the State of Ohio to tax the shares of national banks.

But, in answer to the argument made by the supreme court, we submit that the deduction by State banks of their holdings in Government bonds will not affect the power of the State of Ohio to tax the shares of national banks. One of the restrictions placed by Congress upon the taxation of national bank shares is "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The court in People *vs.* Commissioners, 4 Wall., 244, in holding that national bank shares might be taxed and no deduction made for investment of the bank in United States Government bonds, said (page 256):

> "It is argued that the assessment upon the shares "of the relator is at a greater rate than that of the "personal property of individual citizens, upon the "ground that allowance was made on account of "United States securities, held and owned by them, "when at the same time the deduction was disallowed "to him.
>
> "The answer is, that upon a true construction of "this clause of the act the meaning and intent of the "law-makers were that the rate of taxation of the

> "shares should be the same, or not greater, than upon
> "the moneyed capital of the individual citizen which
> "is subject or liable to taxation."

The act of Congress passed in June, 1864, relating to the taxation of the shares of national banks contained the restrictive clause: "The tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located."

In February, 1868, this section of the national banking act was amended by striking out the above restrictive clause relative to the taxation of the shares of State banks. The supreme court of the State of Ohio, in the case at bar (Rec., p. 16), held as follows:

> "Section 5219 was materially changed by the
> "amendment of February 10, 1868, whereby the pro-
> "vision as to the tax on shares of State banks was
> "omitted, and the restriction that the taxation on
> "national bank shares shall not be at a greater rate
> "than on other moneyed capital, was inserted."

But the learned court was in error; the restriction that the taxation of national bank shares shall not be at a greater rate than on other moneyed capital in the hands of individual citizens was in the original act of 1864. The amendment in 1868 simply omitted the restriction regarding the shares of State banks.

The Van Allen case was decided prior to the amendment of 1868, and was based upon the clause relative to State banks, which was afterwards stricken out.

As to exactly what is meant by the term "moneyed capital" as used in the banking act, the opinion of this court in the case of the Mercantile National Bank *vs.* New York, 121 U. S., 138, is particularly full and instructive.

The rule as laid down by this court is clear that the discrimination against national bank shares in matters of taxation sought to be prevented by Congress is strictly limited; that the moneyed capital must be taxable moneyed capital, and that the rate and valuation upon such taxable moneyed capital must not be imposed in such a way as to effect a discrimination against the shares of national banks. Hence it follows if the property of the State bank is that which is subject to taxation under the laws of the State of Ohio, the bonds of the United States must be deducted from that property, and such deduction would not be a discrimination against the national banks in the matters of taxation, for the reason that such bonds are *non-taxable* "moneyed capital."

The taxation of the property of the State banks should be, so far as the national banks are concerned, in exactly the same position as is the taxation of the property of the private bankers and unincorporated banks. In Exchange Bank *vs.* Miller, 19 Fed. Rep., 373, the court holds that moneyed capital refers "to other taxable moneyed capital."

The fear expressed by the supreme court of the State of Ohio that unless a tax upon the shares of the State banks be sustained it would be impossible to tax the shares of national banks is groundless. This question was definitely determined in the case of Van Slyke *vs.* The State, 23 Wis., 655:

> SEC. 1, Syll. "Under the national banking act, a "State may tax the shares of national banks therein "located, although it does not tax *eo nomine* the "*shares* of banks organized under its own authority, "but only their *capital;* provided such tax is a full "equivalent for that imposed on the national banks."

Page 665, after discussing Van Allen case, the court holds:

"I find no other decision of that court, or opinion "intimated, in conflict with the position assumed in "these and other cases; and I therefore conclude that "the States may lawfully tax the capital of their own "banks and the shares in the national banks, pro- "vided such be not unequal or so imposed as to dis- "criminate in favor of the State banks and against "the national banks."

This case was affirmed by this court, 154 U. S., 581.

The supreme court of Ohio in the case of Frazer *vs.* Siebern, 16 O. S., 615, has held that the tax upon the property of the State banks would not prevent a proper tax upon the shares of national banks. In that case the court, while holding that the State banks could deduct their Government bonds from their capital, and that the national banks could not deduct them from the shares of stock, held further:

Page 625:

"It by no means follows, however, that the plain- "tiffs are entitled to an unconditional injunction "against the collection of the tax. *They ask equity* "*and must do equity.* They invoke the exercise of an "extraordinary power of the court for their relief, "and the court in its discretion should refuse that "relief, except upon conditions that are equitable and "just. We think, therefore, that the injunction should "only be granted upon the condition that the plaintiffs "or their bank, shall first pay to the treasurer of Hamil- "ton county a sum that will be *a pro rata equivalent* "*for the tax imposed upon the State and independent* "*banks, under the act of 1861, that is to say, such sum* "*as might lawfully have been assessed against the plain-* "*tiffs or their bank, under said act had it been one of* "*said State banks, etc.*"

CONCLUSION.

In brief, the contention of this plaintiff in error is as follows:

First. The constitution of the State of Ohio specifically requires that the property of corporations, and especially banking institutions, shall be taxed. Therefore, in determining the taxable value of the property of the plaintiff in error, the amount of the Government bonds then owned by it must be deducted.

Second. The history of the legislative enactment upon this subject shows clearly that the General Assembly has obeyed the mandate of the constitution and enacted laws for the taxing of all property of State banking institutions. The existing laws simply provide a method for the ready determination of the taxable value of banking property, and hence, in fixing the return made under these laws, the value of the Government bonds owned by this plaintiff in error should be deducted.

Third. A tax upon the shares of stock of a corporation in the hands of the owner is a tax upon a kind of property separate and distinct from the property of the corporation itself, and such a tax is not equivalent to a tax upon the property of a corporation. Hence, if the tax herein complained of be held to be a tax upon shares, it follows that it is unconstitutional in that the property of the corporation is thus exempted from taxation in violation of section 3, article XII, of the constitution of Ohio.

Fourth. If it be held that the tax provided for under sections 2762 and 2769 of the Revised Statutes of Ohio be equivalent to a tax upon the property of a corporation, then it must follow that all bonds of the United States owned by the bank must be deducted in fixing the value of the shares.

Fifth. Unless incorporated banks and trust companies organized under the laws of Ohio are permitted to deduct Government bonds from their resources for the purpose of taxation, there is a gross discrimination in favor of unincorporated banks and bankers, and there is a violation of the provision of the constitution of Ohio which requires uniformity in taxation.

Sixth. The property of an Ohio corporation being subject to tax, the shares of stock of such corporation in the hands of the owner are exempted from taxation.

Seventh. The taxation of the shares of national banks is permitted by the Congress of the United States and must be imposed in a certain definite way, namely, by a tax upon the shares and not upon the property of the bank.

Under this act of Congress the shares of national banks may be taxed without regard to the character of the investment of the capital of the bank. Hence Government bonds owned by national banks may, by the permission of Congress, be indirectly subjected to a tax. This permission, however, has not been extended to the direct or indirect taxation of Government securities owned by corporations other than national banks.

The national bank decisions do not govern or control the question at issue in this case for the reason that the right granted by Congress to the States to tax the shares of national banks does not extend to the shares of stock in other corporations.

The imposition of a tax upon the shares of national banks does not prevent the taxation of the property of State banks.

The State of Ohio is not required to tax the shares of national banks. It simply *may* do so. The State is, however, required to tax the property of State banks. Having fulfilled that requirement, its right to tax the shares of national banks is restricted in this particular, to wit, that

such taxation shall not be at a greater rate than is assessed upon other moneyed taxable capital.

Therefore, this plaintiff in error has the right to deduct from its taxable property the amount of United States Government bonds owned by it, regardless of the effect that such deduction might have upon the taxation of the shares of national banks.

JAMES RUDOLPH GARFIELD, *Attorney.*

HARRY A. GARFIELD,
JAMES R. GARFIELD,
FREDERIC C. HOWE,
Of Counsel.

CLEVELAND, OHIO, *October* 26, 1901.